

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

CC:LM:FSH:BRK:TL-N-1791-01

HNAdams

date: March 29, 2001

to: Large & Mid Size Business Division  
Territory Manager (Heavy Manufacturing, Construction &  
Transportation)

Attn: (b)(7)c

from: Associate Area Counsel (Financial Services & Healthcare)  
CC:LM:FSH:BRK

subject:

U.I.L. No. 6229.02-00, 6501.08-09, 6501.08-17

THIS DOCUMENT MAY INCLUDE CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES, AND MAY ALSO HAVE BEEN PREPARED IN ANTICIPATION OF LITIGATION. THIS DOCUMENT SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE IRS, INCLUDING THE TAXPAYER INVOLVED, AND ITS USE WITHIN THE IRS SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW THE DOCUMENT IN RELATION TO THE MATTER OF THE CASE DISCUSSED HEREIN. THIS DOCUMENT IS ALSO TAX INFORMATION OF THE INSTANT TAXPAYER WHICH IS SUBJECT TO I.R.C. § 6103.

Reference is made to your request of March 16, 2001 for assistance with respect to Consents to Extend the Time to Assess Tax relating to . You asked us to review the following and to assess their validity:

(1) A Form 872-P signed by on

(2) A Form 872-P signed by on ; and

(3) A Form 872 signed by on ; and

(4) A Form 2848 signed by on

BACKGROUND

For purposes of this response, we understand the facts are as follows:<sup>1/</sup>

[REDACTED] is a limited partnership. It filed Forms 1065, U.S. Partnership Returns of Income, for calendar years [REDACTED] and [REDACTED]. Both of those returns were signed by [REDACTED]. The [REDACTED] return is subject to the TEFRA provisions, but the [REDACTED] return is not. [REDACTED] signature on the [REDACTED] return is dated [REDACTED] and the return bears a stamp indicating that it was received by the Service's Philadelphia Service Center on [REDACTED].

The Tax Matters Partner of [REDACTED] for [REDACTED] is [REDACTED]. [REDACTED] signed the [REDACTED] and [REDACTED] Forms 1120 of [REDACTED] and indicated his titles on those returns as "General Counsel North America" and "Secretary," respectively. [REDACTED] signature on the [REDACTED] Form 1120 is dated [REDACTED] and the form bears a stamp indicating that it was received by the Service's Philadelphia Service Center on [REDACTED].

On [REDACTED], [REDACTED] signed a Form 2848 Power of Attorney and Declaration of Representative purporting to appoint [REDACTED] and [REDACTED] the representatives of [REDACTED] for its "[REDACTED]-current" years. [REDACTED] title is identified as "Secretary."

On [REDACTED], [REDACTED] signed a Form 872-P Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership purporting to extend until [REDACTED] the period within which the Service may assess Federal income tax with respect to the partners of [REDACTED] attributable to partnership items of that partnership for [REDACTED]. He signed in the space labeled "Tax Matters Partner Sign Here."

On [REDACTED], [REDACTED] signed a Form 872-P purporting to extend until [REDACTED] the period within which the Service may assess Federal income tax with respect to the partners of [REDACTED] attributable to partnership items of that partnership for [REDACTED]. He signed in the space labeled "Authorized

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<sup>1</sup> Our understanding of the facts is based on the documents that you faxed us on March 16, 2001 and the information that you provided during our telephone conversation on that date and on March 29, 2001.

Person Sign Here" rather than in the space labeled "Tax Matters Partner Sign Here."

On [REDACTED], [REDACTED] signed a Form 872 purporting to extend until [REDACTED] the period within which the Service may assess Federal income tax due on the [REDACTED] income tax return of [REDACTED]. He signed the form in the space labeled "Your signature here" rather than in the space labeled "Corporate Officers Sign Here."

[REDACTED] filed a separate return for [REDACTED] rather than as a member of a consolidated group.

#### ISSUES

1. Is the Form 872-P signed by [REDACTED] on [REDACTED] valid to extend until [REDACTED] the period within which the Service may assess Federal income tax with respect to the partners of [REDACTED] attributable to partnership items of that partnership for [REDACTED]?

2. Is the Form 872-P signed by [REDACTED] on [REDACTED] valid to extend until [REDACTED] the period within which the Service may assess Federal income tax with respect to the partners of [REDACTED] attributable to partnership items of that partnership for [REDACTED]?

3. Is the Form 872 signed by [REDACTED] on [REDACTED] valid to extend until [REDACTED] the period within which the Service may assess Federal income tax with respect to the [REDACTED] income tax return of [REDACTED]?

4. Is the Form 2848 signed by [REDACTED] on [REDACTED] valid to appoint representatives for [REDACTED] for "[REDACTED]-current" years?

#### CONCLUSIONS

1. Although the capacity in which [REDACTED] signed the Form 872-P on [REDACTED] is ambiguous, we believe it is valid and would defend its validity. To prevent the ambiguity from arising in the future, we recommend the better practice is to require that signatures reflect the capacity in which individuals are signing.

2. The Form 872-P relating to [REDACTED] signed by [REDACTED] on [REDACTED] contains multiple ambiguities. Although we believe the consent is valid and would defend its validity if necessary, given that the period provided by

Code section 6229 remains open until [REDACTED] under the consent signed by [REDACTED] on [REDACTED], we recommend that you solicit and secure a replacement consent if you intend to rely on the period provided by Code section 6229 being open beyond [REDACTED].

3. The capacity in which [REDACTED] signed the Form 872 relating to [REDACTED] on [REDACTED] is ambiguous. Although we believe the consent is valid and would defend its validity if necessary, given that it appears that the period provided by Code section 6501(a) remains open, we recommend that you solicit and secure a replacement consent if you intend to rely on the period provided by Code section 6501(a) being open beyond the date that is [REDACTED] years from when [REDACTED] filed its [REDACTED] return.

4. The Form 2848 signed by [REDACTED] on [REDACTED] contains multiple ambiguities. Both the capacity in which [REDACTED] signed the form and the years to which the form relates are ambiguous. We recommend that you obtain separate consents covering the TEFRA and non-TEFRA years following the guidance contained herein.

#### ANALYSIS

1. Is the Form 872-P signed by [REDACTED] on [REDACTED] valid to extend until [REDACTED] the period within which the Service may assess Federal income tax with respect to the partners of [REDACTED] attributable to partnership items of that partnership for [REDACTED]?

In general, Code section 6229(a) provides that the period for assessing any income tax attributable to partnership items (or affected items) for a partnership taxable year will not expire until the later of a date which is 3 years after the partnership files its information return for the taxable year in question or the last day for filing such return for such year (without extensions). This minimum 3-year period may be extended by agreement as provided in Code section 6229(b):

(b) EXTENSION BY AGREEMENT.--

(1) IN GENERAL.--The period described in subsection (a) (including an extension period under this subsection) may be extended--

(A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement),

before the expiration of such period.

In this case, we understand that [REDACTED] is the TMP of [REDACTED] for [REDACTED]. As a result, Code section 6229(b)(1)(B) authorizes it to enter into agreements with the Service to extend the period within which the Service may assess Federal income tax with respect to the partners of [REDACTED] attributable to partnership items of that partnership for [REDACTED].

A consent's failure to indicate that an individual is signing as the representative of an entity does not invalidate the consent where it is clear from the circumstances that the individual intends to make an agreement between the entity and the Service rather than between him or her self and the Service. For example, in Georgetown Petroleum-Edith Forrest v. Commissioner, T.C. Memo. 1994-13 the Tax Court considered and rejected a taxpayer's argument that a consent was invalid because the signer had not identified on the signature line of the consent the representative capacity in which he acted. The court discussed case law supporting the proposition that the failure to identify the representative capacity in which the individual had signed did not invalidate the agreement, and then explained that it was clear from the circumstances that the individual had not intended to make an agreement between himself individually and the Service. The situation in this case is analogous. The Form 872-P at issue clearly states that it is an agreement between the Service and [REDACTED]. The Form 872-P further states that it applies to "[t]he amount(s) of any Federal income tax with respect to all partners attributable to any partnership item(s) for [REDACTED] [REDACTED] for the year ended December 31, [REDACTED] \* \* \*." In these circumstances, we do not believe that the form's failure to indicate that [REDACTED] was signing in his capacity as a representative of [REDACTED]'s TMP [REDACTED] invalidates the consent. See also Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 854 (1985).

Although we would defend the validity of the consent, the form's failure to indicate that [REDACTED] was signing as representative of [REDACTED] creates ambiguity as to the capacity in which he is signing. To prevent the ambiguity from arising in the future, we recommend the better practice is to


require that signatures reflect the capacity in which individuals are signing. For example, "[REDACTED], Secretary, [REDACTED]" Given that it appears that the three year period provided by Code section 6229 for assessing Federal income tax with respect to the partners of [REDACTED] attributable to partnership items of that partnership for [REDACTED] would have expired on or about [REDACTED] without this consent, we would defend its validity.

2. Is the Form 872-P signed by [REDACTED] on [REDACTED] valid to extend until [REDACTED] the period within which the Service may assess Federal income tax with respect to the partners of [REDACTED] attributable to partnership items of that partnership for [REDACTED]?

As was the case above, this form's failure to indicate the capacity in which [REDACTED] signed creates ambiguity as to that matter. As was the case above, we do not believe that ambiguity invalidates the consent.

The ambiguity created by the failure to indicate the capacity in which [REDACTED] is signing is compounded by what appears to be the incorrect placement of [REDACTED] signature on the Form 872-P. Courts have concluded that the incorrect location of a party's signature on a waiver of the statute of limitations form does not render the waiver invalid. See, e.g., Monetary II Ltd. Partnership v. Commissioner, 47 F.3d 342, 347 (9th Cir. 1995) (concluding that waiver was valid even though TMP signed on line for authorized representative); Cambridge Research v. Commissioner, 97 T.C. 287, 302 (1991) (finding it of "no moment" that authorized representative signed on the line designated for the signature of the tax matters partner).

(b)(7)a, (b)(5)(AC)



Although we would defend the validity of this consent if necessary, given that the period provided by Code section 6229 remains open until [REDACTED] under the consent signed by [REDACTED] on [REDACTED], we recommend that you solicit and secure a replacement consent if you intend to rely on the period

provided by Code section 6229 being open beyond [REDACTED]. To preclude the ambiguities discussed above from arising, you should ensure that the replacement consent reflects the capacity in which [REDACTED] is signing.

3. Is the Form 872 signed by [REDACTED] on [REDACTED] valid to extend until [REDACTED] the period within which the Service may assess Federal income tax with respect to the [REDACTED] income tax return of [REDACTED]?

A consent on behalf of a corporate taxpayer may be signed by any individual who had authority to sign the corporation's return, such as its president, vice-president, treasurer, assistant treasurer, chief accounting officer, and any other officer duly authorized so to act. Rev. Rul. 83-41, 1983-1 C.B. 349. The fact that an individual's name is signed on a corporation's return is prima facie evidence that the individual had authority to do so. Id. Here, [REDACTED] signed the [REDACTED] return of [REDACTED] as its secretary. Although secretary is not one of the corporate officers specifically identified in Rev. Rul. 83-41, that ruling specifically allows returns to be signed by other duly authorized officers. Moreover, at least one court has held that the general duties of a corporate secretary include executing consents to extend the period within which the Service may assess tax. See Philip Carey Manufacturing Co. v. Dean, 58 F.2d 737, 737 (6th Cir. 1932). Assuming he remained a corporate officer when he signed the consent extending the period within which the Service may assess Federal income tax with respect to [REDACTED] it accordingly appears that [REDACTED] had authority to sign the consent.

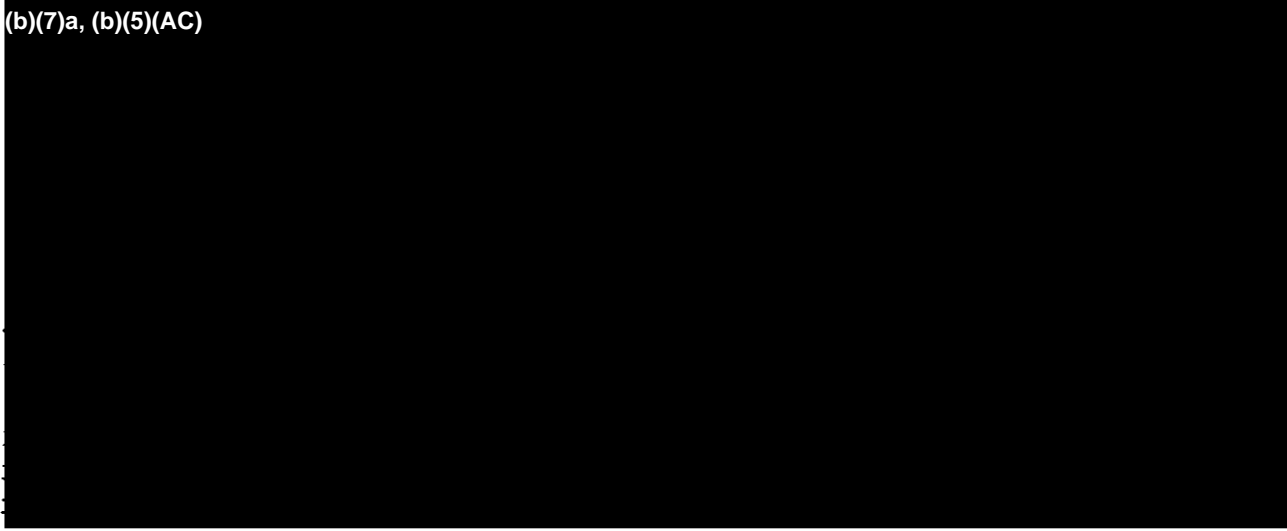
We do not believe that [REDACTED] failure to sign the consent on the line designated for corporate officers invalidates the consent. The Tax Court addressed a similar situation in Three G Trading Corp. v. Commissioner, T.C. Memo. 1988-131, and concluded that a former corporate president's signature the line for individual taxpayers rather than on the line for corporate representatives did not invalidate a consent. The court explained that consents need not be executed perfectly. See also Eversole v. Commissioner, 46 T.C. 56, 61 (1966) (holding waiver signed by executor valid despite executor's failure to indicate that she was signing in representative capacity).

Although we would defend the validity of this consent if necessary, given that it appears that the period provided by Code section 6501(a) remains open, we recommend that you solicit and secure a replacement consent if you intend to rely on the period provided by Code section 6501(a) being open beyond the date that is three years from when [REDACTED] filed its [REDACTED] return.

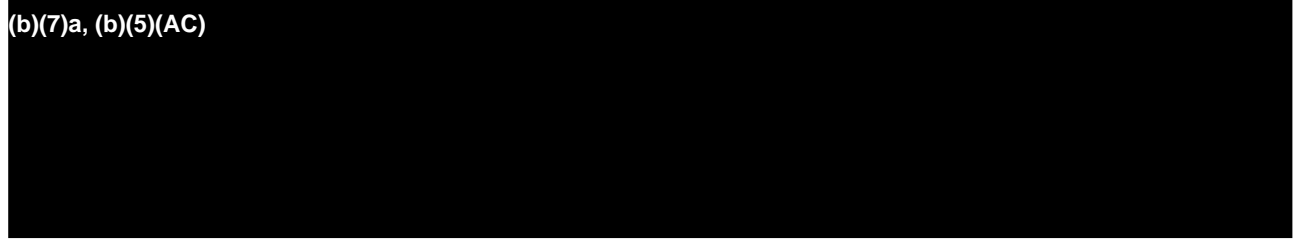
To preclude the ambiguity discussed above from arising, you should ensure that [REDACTED] signature appears on the line for corporate officers and indicates his title.

4. Is the Form 2848 signed by [REDACTED] on [REDACTED] valid to  
appoint representatives for [REDACTED] for  
"[REDACTED]-current" years?

(b)(7)a, (b)(5)(AC)



(b)(7)a, (b)(5)(AC)



The instructions to the Form 2848 provide guidance on who may execute the form on behalf of partnerships. The instructions to the Form 2848 explain that all partners must sign unless one partner is authorized to act in the name of the partnership.<sup>3/</sup> They

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<sup>2</sup> This advice is consistent with Treasury Regulation section 601.503(a)(5), which provides that a power of attorney must include a description of the matters for which representation is authorized including among other things "[t]he specific year(s)/period(s) involved \* \* \*."

<sup>3</sup> This instruction is consistent with Treasury Regulation section 601.503(c)(3), which provides that a power of attorney for a partnership "must be executed by all partners, or if executed in the name of the partnership, by the partner or partners duly authorized to act for the partnership, who must



state that for TEFRA years the TMP of the partnership is authorized to execute the power of attorney.<sup>4/</sup> For non-TEFRA years, the instructions state that a partner is authorized to act in the name of the partnership if, under state law, the partner has authority to bind the partnership. The instructions specify that a copy of such authorization must be attached to the Form 2848.

The Power of Attorney at issue purports to relate to both TEFRA (1996) and non-TEFRA (1997) years of [REDACTED]. As is discussed below, different recommendations apply to TEFRA and non-TEFRA years.

(b)(7)a, (b)(5)(AC)

[REDACTED]

For the TEFRA years, training materials distributed during recent TEFRA training contain the following recommendations for completing Forms 2848:

- (1) the TMP should execute the form in his capacity as TMP;<sup>5/</sup>

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certify that he/she has such authority."

<sup>4</sup> Support for the proposition that the authority of the TMP may be delegated to an attorney-in-fact and that Form 2848 is effective to accomplish that task is found in Amesbury Apartments, Ltd. v. Commissioner, 95 T.C. 227 (1990). In that case, the Tax Court held that a consent signed by a CPA acting pursuant to a Form 2848 that was executed by a general partner other than the TMP was effective to extend the statute of limitations with respect to all of the partners in the partnership.

<sup>5</sup> In this case, assuming the Form 2848 is signed by [REDACTED] as a representative of the TMP, this recommendation could be accomplished by placing the following in the space for [REDACTED] title: "Secretary, [REDACTED], TMP."

(2) the name and address of the entity should be clearly set forth;

(3) under the heading "Type of Tax" insert "TEFRA partnership proceedings;" and

(4) under "Federal Tax Form Number" insert "1065 and consequential adjustments."

(b)(7)a, (b)(5)(AC)

This opinion is based on the facts set forth herein. It might change if the facts are determined to be incorrect or if additional facts are developed. If the facts are determined to be incorrect or if additional facts are developed, this opinion should not be relied upon. You should be aware that, under routine procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

If you have any questions about this advice, you should call Halvor Adams at (516) 688-1737.

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